(1)

87-1396

No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

EUGENE PERRY, Petitioner,

v.

U.S. PAROLE COMMISSION, DUDLEY BLEVINS, Warden, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THEODORE T. JONES, JR.
16 Court Street
Suite 2308
Brooklyn, N.Y. 11201
(718) 625-1212
Counsel of Record

CALVIN C. SAUNDERS
1 World Trade Center
Suite 8817
New York, N.Y. 10038
(212) 323-8014
Counsel for Petitioner

January 25, 1988

67 PP

QUESTIONS PRESENTED

1. Is information contained in "supporting documents", which makes reference to charges more serious than listed charges, technical and nonprejudicial, despite "any" variance?

2. Is an administrative determination which uses a technical violation as the basis for imposing a penalty for an unlisted serious violation of which the reviewing body was initially aware of, arbitrary and capricious?

3. Can "supporting documents" be used as a substitute for written notice?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Eugene Perry, and the respondents, The United States Parole Commission, and Dudley Blevins, Warden, U.S. Penitentiary, Terre Haute, Indiana.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND REGULATIONS:

MISCELLANEOUS

IN THE UNITED STATES SUPREME COURT

October Term, 1988

EUGENE PERRY, Petitioner

v.

U.S. PAROLE COMMISSION, DUDLEY BLEVINS, Warden, et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

EUGENE PERRY, the petitioner herein prays that a writ of certiorari issue to the U.S. Court of Appeals, for the Eighth Circuit, entered in the above entitled proceeding on October 28, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, for the Eighth Circuit (Petitioner's Appendix, infra, p.1, hereinafter referred to as A.-pp.) is reported in 831 F.2d 811 (8th Cir. 1987). The opinion of the District Court below (A.-11) was not reported.

JURISDICTION

The judgment of the Court below, (A.-1) was entered on October 28, 1986. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18, United States Code, Section 4214.

Title 28, United States Code, Section 1254.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the Title 18, Section 4214 case now before this Court.

In November 1975 the United States District Court for the District of New Jersey sentenced the petitioner Eugene Perry, to 25 years imprisonment for armed bank robbery. The petitioner was paroled from this sentence on November 3, 1983, and was to be supervised until July 1, 2000.

On May 18, 1984, the police in Woodbridge, New Jersey, arrested the petitioner and two other individuals for possession of a stolen automobile. A search revealed that the stolen car contained masks, gloves, pillow cases,

and two bullets and that all three individuals were wearing two sets of clothing. On May 21, 1984, all three individuals were charged with conspiracy to commit bank robbery, but this complaint was dismissed on May 31, 1984. A New Jersey grand jury subsequently indicted the petitioner and the two others for theft in the third degree for receiving a stolen automobile. Eventually all charges against Mr. Perry were dismissed.

On August 15, 1984, a Parole Warrant Violation issued on August 6, 1984, was executed listing three specific charges: (1.) Theft Stolen Auto, (2.) Associating with persons engaged in Criminal Activities, and (3) Drug Use.

After a hearing on these charges before the U.S. Parole Commission, herinafter "Commission", held on January 3, 1985, petitioner was informed by a

Notice of Action, that instead of the penalties conforming to the guidelines for the listed charges, the penalties for attempted bank robbery had been imposed.

B. Existence of Jurisdiction Below

On January 28, 1985, Mr. Perry appealed the decision the National Appeals Board affirming the revocation. Petitioner then filed an application for a writ of habeas corpus, alleging that the Commission had revoked his parole through a process which violated his constitutional right to due process and inconsistant wih the "Commission's" guidelines. On August 7, 1986, United States Magistrate Floyd E. Boline issued a report and recommen-dation which advised the United States District Court for the District of Minnesota to deny petitioner's application. After a de novo review of those portions of the re-

port and recommendation to which petioner objected, United States District Judge Diane E. Murphy, denied the petition for a writ of habeas corpus on October 27, 1986. Mr. Perry then appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the judgment of the District Court by a decision filed on Oct 27, 1987.

C. Relevant facts underlying the decisions below.

The relevant facts are contained in Petitioner's writ of habeas corpus under 18 U.S.C. Section 4214. Mr. Perry received a Warrant Application listing three specific charges.

He had endeavored to produce at his revocation hearing, Mr. Hawkins, one of the persons arrested with him, who had

allegedly made a statement implicating petitioner in a plan to rob a bank.

Perry had subpoened the arresting officer in addition to Mr. Hawkins. Petitioner, after consulting substitute counsel on the charges and penalties stated in the warrant, in light of ongoing delay, proceeded without said witnesses.

One of the hearing examiners, Mr. Alex, determined under the charge listed as "1. Theft- / receiving stolen automobile (third degree)", that a finding of "Charge #1--Theft (attempted robbery)" was indicated based on "Information set forth in the...police reports regarding your criminal activity of 5/18/84, as well as the information set forth in the USPO's report surrounding the 5/18/84 development." He also found "Charge #2--Association with persons bent on on the

commission of criminal activity" for the same reasons.

The U.S. Parole Commission thereafter disregarded the recommendation of examiner Newman, to hold petitioner for 32 months, and followed Mr. Alex's reccommendation to hold Mr. Perry for 60 months (fitting the Commission's guidelines for attempted bank robbery instead of auto theft). Testimony from witnesses was not taken in support of the documentation, nor did examiner Alex specify the portions of the documentation he relied upon.

The District Court below (Magistrate Boline), concluded that Mr. Perry was "given copies of the Summary Report of the Probable Cause Interview and the documentary evidence on which the warrant application and subsequent revocation were based. That these letters and attachments made clear that the Commis-

sion was considering petitioner's involvement in the alleged bank robbery conspiracy as a possible parole violation."

Based on this recommendation District Court Judge Diane E. Murphy concluded:

> "after reviewing all of the material provided to the petitioner ...that petitioner was given constitutionally adequate notice of the charges to be considered at his revocation hearing. These materials indicate that the Parole Commission was considering the charge of conspiracy to commit bank robbery and was aware of the underlying charges. These same facts formed the basis of the commissions finding that petitioner had committed Theft/attempted bank robbery."

On appeal the Eighth Circuit determined that, "there was a varience between the theft charges listed in the warrant and the theft listed in his notice of parole revocation. However technical and

nonpredjudicial varience in parole revocation proceedings do not rise to constitutional violations.", citing Martineau v. Perrin, 601 F.2d 1201, 1205 (1st Cir. 1979). In reaching its decision to affirm, the Court of Appeals decided that the listed charges and supporting documents detailed the charges, concluding that under these circumstances "any" varience was technical and non-prejudicial.

REASONS FOR GRANTING WRIT

We respectfully urge that the decision is erroneous and at variance with this Court's decisions in the following respects:

A. That "any" variance between the listed charges and the charges stated in the examiners determination was not a mere non-prejudicial technicality.

We believe that this is the heart of the Court of Appeals' decision. Such reasoning misapplies the First Circuit Court's decision in Martineau v. Perrin, supra. In Martineau, the variance involved the lack of distinction between a charge which alleged the parolee although legally married, had continued an intimate relationship with another woman not his wife, and had kept late hours during a two day time period. Where the parolee was in fact unmarried and the woman with whom he had the relationship with was the one married, this fact and his admission of sleeping away from home on one occassion, were deemed technical and non prejudicial errors. The issue arises whether here, Perry, was prejudiced by limiting the stated charges to those of less consequence when the commission was aware of supporting documentation, known

to the Commission at the time the warrant application is submitted.

This Court has determined "The minimum requirement of due process include inter alia, written notice of the claimed violations of parole." Morrissey v. Brewer, 408 U.S. at 489, 92 S.Ct. at 2604. It was the Court's rational that "The very purpose of notice is to permit a parolee the opportunity to contest the facts and present a defense or mitigating factors." Id. 408 U.S. at 92 S. Ct. at 2603.

The very purpose of the written notice is undermined where the Commission misleads the parolee on critical concerns such as the seriousness of the charges. As a consequence, the appropriate defense counsel and defense to be presented, are directly affected.

The cases recognizing additional charges and penalties based on admissions

of the parolee require distinction. In Martineau, supra, the Court, citing Morrisey, supra., and in United States v. ex rel Carson Taylor, 540 F.2d 1156 (2d Cir. 1976), concluded that if it is determined that petitioner admitted to the Parole Board...and if these violations are found to be reasonable grounds for revoking parole under state standards, this is a clear invitation to the Board to inquire into the parolee's conduct. In the case at hand, there were no admissions by the parolee. It was inconsistant with the written notice requirement of Morrisey to claim that the Commission can formally present one set of charges and penalize the parolee for violations based on a hidden agenda which was being considered, yet kept secret from the parolee.

Further distiguised from Martineau, is consideration of a parolee's arrest.

In Martineau, the Court recognized that consideration of the arrest at a time when Martineau had not yet been arraigned or tried would have been unfair. Martineau had been convicted and after having his day in Court, notice could not have helped him prepare since he could not relitigate issues determined in another forum. Martineau v. Perrin, Id at [1206].

Eugene Perry had not been tried. On August 6, in the "Warrant Application", it would not have unduly burdened the Commission to express its intent to consider a charge of attempted bank robbery. There was no new information between the time that the warrant was issued, and the hearing, which was not initially available. Judge Murphy determined that the materials provided to Mr. Perry "indicate that the Parole Commission was considering the charge to commit bank robbery and

aware of the facts underlying that charge." Under these circumstances it was misleading for the Commission to fail to list the most serious charge when according to Judge Murphy, the charge was in fact being considered at the time when the warrant was requested.

To place the burden upon the parolee to guess which unlisted charges the Commission is actually considering, not only defeats the purpose of the Morrissey, it also contradicts the expessly stated warrant requirement that provides the procedural process to supplement the warrant upon the discovery of new information supporting additional charges.

B. The varience between the charges contained in the Warrant Application and those listed in the Notice of Action was arbitrary and capricious and therefore not merely technical and nonprejudicial.

The decision of hearing examiner Alex was not only at variance from the charges the parolee was informed of in writing, it was also ambiguous in its content.

Mr. Perry was informed by the Warrant Application, the Summary Report, and the Hearing Summary, that Charge #1 was "Theft/receiving stolen automoble". Examiner Alex made a finding separate from Examiner Newman, in which he determined "Theft/Attempted Bank Robbery". However, Mr. Alex did not make the penalty recommended under this charge. Instead, Alex couched his recmmendation of reparole after 60 months under charge #2, Association. Attempted bank robbery was merely a titular bridge to cross the gap between a serious violation and "Association", a technical violation.

Examiner Alex did not have the circumstances attenuated to bank robbery

within his purview under Charge #1. The supporting information contained in the Warrant Application, the Preliminary Report, and the Review of Charges portion of the Hearing Summary, all limited Charge#1 to occupancy and flight in and from a stolen auto. The only charge related to the circumstantial evidence of attempted bank robbery was Charge #2, "Association with persons involved in criminal activity", a technical violation. The guidelines designate the seriousness of such a charge as considerably less than auto theft. U.S.P.O. Rules and Regulations Manual, Sec. 2.42-01 (d)(7), cf. 79 Yale L.J. 698 (1970)

It is submited that to use technical violations in the Warrant Application where a serious violation is actually being considered by the Commission, undermines the objective of Morrissey, preparation of the parolee's defence. In

this situation, the variance goes further. Here the Commission withheld its intent, punishment for attempted bank robbery, misled the defense to prepare defense against charges of lesser consequences, and used the least consequential charge as the basis for the most serious penalty. The penalty of 60 months was justified under a specific charge never listed prior to the hearing and determined from allegations known at the time of the warrant application, not discovered during the hearing.

If the actions of the Commission were not intentionally designed to thwart the preparation of the defense, the decisions of Mr. Alex were clearly an attempt to restructure the charges using the technical violation of Charge#2 to support a penalty appropriate only under Charge #1 or an additional charge discovered during the hearing.

C. Use of "supporting papers" as a substitute for the written notice requirement is unfair and prejudicial.

Unlike U.S. ex rel Pihakis v. Thomas, 488 F. Supp 462 (S.D. New York, 1980), where the court found technical error to be non-prejudicial, again citing Matineau, the error did not mislead the defense as to the seriousness of the charges. In Pihakis, a second warrant charging perjury was said to have been a clarification rather than a supplement to the first warrant. Both warrants were determined by the Court to have providing notice that the subject of the Commission's inquiry that all of Pihakis' convictions on a certain date were in issue. U.S. ex rel Pihakis, Id at 467. The court noted in footnote #4 on page 467, that "even assuming the notice to have

been inadequate to appraise Pihakis that the perjury conviction was at issue, no predjudice resulted since Pihakis was subsequently given the opportunity to adjourn the hearing. "U.S. ex rel Pihakis, Id.

In Mr. Perry's situation, there was no opportunity for an adjournment upon notice of an aditional charge. There was no clarification that would reasonably appraise the parolee or his counsel that the Commission was considering from the initial warrant application a charge of attempted robbery. Not only had the N.J. District Court dropped the conspiracy charge, as aknowledged to Perry in "supporting papers", but the pending State carge was limited to "Theft Recieving Stolen Automobile". An investigation had been conducted by the detective squad of the New Jersey State police department and the police report

indicated information was sent to both New York and New Jersey law enforcement agencies to follow up on suspicions that Perry was involved in several robberies. From the time of his arrest until the present date Mr. Perry has never been identified or implicated in bank robbery, other that in the N.J. District Court, which the Commission informed him had been dropped prior to the Preliminary Hearing.

It was not reasonable for the District Court to conclude Mr. Perry had notice that the Commisssion was considering a charge of attempted bank robbery from supporting papers when such a charges was not expressed in the written notice detailing specific charges. Especially in light of both the dismissal of the indictment and the absence of any incriminating information stemming from the investigation.

The unfair surprise of a charge of attempted robbery is further accentuated by the use of Charge #2, Association, to support the penalty for bank robbery. "Association" is an infraction not falling within the "subsequent crimes" catagory. U.S.P.O. Rules and Regulations Manual, Sec. 2.42-01 (d) (7). Assuming arguendo that the examiner, could make a finding of "Association with persons bent on criminal activity", although notice was given of "Association with persons involved in criminal activity"; to include a charge of bank robbery under notice of a technical violation creates a catchall catagory. There is no distiction from this process and the use of the police report as being dispositive of the factual allegations. A finding of criminal conduct based soley upon evidence of a probation officer's summary of an arrest report is but a step away

from criminal conduct based soley upon evidence of a parolee's arrest with no account of underlying circumstances. Taylor v. U.S. Parole Commission, 734 F.2d. 1152 at 1156. Any activity mentioned in a police report could now be the basis of a serious charge diguised under a charge of "Association". Unlike Taylor, supra, it is far more detrimental to the parolee's defense to be misguided as to the seriousness of the charges, than to merely be concerned that unsubstantiated reports might be use against him. Here, the defendant had twice subpoenaed witnesses who were vital in corroborating or contradicting the reports. It cannot be said that his decision to waive the appearance of his witnesses was not affected by the ommission of the bank robbery charge.

D. The Court of Appeals has decided on important questions of federal law which have not been, but should be, settled by this Court.

The Court of Appeals below noted that a parolee is entitled to written notice of the claimed violation of parole, recognizing a due process right expessed by this Court in Morrissey v. Brewer, supra.

Whether the notice requirement can be satisfied by additional information discovered during the revocation process is not before the Court in this petition. We present to this Court a more fundamental question for review, i.e., can the U.S Parole Commission, having an intent to consider a specific serious violation at the time of providing written notice, satisfy due process notice requiements by reference in supporting papers, without directly informing the parolee that more

serious charges are being considered under listed charges of less consequence.

This Court has always held that notice must be reasonaly adequate to assist the parolee in the preparation of his defense. We think it important that this Court reinterate the principles of Morrissey by requiring specificity in the written notice requiement, of the most serious charges being considered by the Commission.

CONCLUSION

The judgment below is an overreaching deviation from decisions of this Court requiring due process notice. As such it represents a departure from Fourteenth Amendment due process rights to prepare a defense to written charges, expanding the written requirement to include "supporting documents". Thus the

written notice requirement becomes incidental and the parolee is assumed to have knowledge of the charges based upon the presumption of his guilt. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

THEODORE T. JONES
16 Court Street
Suite 2308
Brooklyn, New York 11201

January 25, 1988

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 86-5450

Eugene Perry, *

Appellant, *Appeal from the United

*States District Court

v. *for the District of

*Minnesota

U.S. Parole Commission;

Dudley Blevins, Warden,

Appellees.

Submitted: June 8, 1987

Filed: October 27, 1987

Before McMILLIAN, Circuit Judge, FAIRCHILD* Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

---

* The Honorable Thomas E. Fairchild, Senior Circuit Judge for the United States Court of Appeals for the Seventh Circuit sitting by designation.

McMILLIAN, Circuit Judge.

Eugene Perry[1] appeals from a final judgment entered in the District Court[2] for the District of Minnesota dismissing his petition for a writ of habeas corpus brought under 28 U.S.C. Sec. 2241. Upon the recommendation of a magistrate, the district court denied relief. For reversal, Perry argues that the United States Parole Commission (Parole Commission) revoked his parole through a pro cess that violated his constitutional right to due process and Parole Commission regulations. For the reasons discussed below, we affirm the judgment of the district court.

The facts are not in dispute. In November 1975 the District Court for the

1. Perry is currently in custody in the Federal Medical Center in Minnesota.
2. The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

District of New Jersey sentenced Perry to twenty-five years imprisonment for armed bank robbery. In November 1983 Perry was released on parole with supervision until July 2000. On May 19, 1984, Perry and two other individuals were arrested for possession of a stolen motor vehicle. The three individuals were each wearing two sets of clothing and a search of the stolen vehicle revealed masks, gloves, ammunition, and pillow cases. Additionallly, one of the two other individuals told a police officer they were "going to rob a bank and use the stolen car as a getaway vehicle." On May 21, 1984, Perry and the other two individuals were indicted in federal court and charged with conspiracy to commit bank robbery. This charge, however, was later dismissed before trial.

A parole officer investigated Perry's arrest. Based on his report,

Perry received a parole violator warrant dated August 6, 1984. The listed charges were (1) theft/receiving stolen automobile, (2) association with persons involved in criminal activity and (3) use of narcotics. Specifically charge two--association with persons involved in criminal activity--was based on Perry's arrest in regard to charge one--theft/receiving stolen automobile.

On September 5, 1984, a preliminary interview conducted by Probation Officer Ronan A. Giehl found probable cause to believe Perry had violated the condition of his parole. His findings were sent to Perry in a letter dated September 14, 1984. The letter listed the same three charges as the basis for the finding and stated that a parole revocation hearing would be scheduled. Perry's hearing was subsequently scheduled for November 19, 1984. Because his attorney was ill,

Perry requested a postponement and the hearing was rescheduled for January 3, 1985.

The parole revocation hearing was held as scheduled. On January 10, 1985, the Parole Commission issued its Notice of Action and revoked Perry's parole for sixty months. The charges listed for revocation of parole were (1) theft/attempted robbery and (2) association with persons bent on the commission of criminal activity. After exhausting all remedies, this appeal followed. In reviewing the Parole Commission's decision, this court must affirm unless the decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. Sec. 706 (2) (A).

Perry's first contention is that the Parole Commission could not consider the dismissed "conspiracy to commit bank rob-

bery" charge as a basis for revoking his parole. Perry argues the dismissal was equivalent to a determination of not guilty. Furthermore, Perry argues, the Parole Commission cannot consider dismissed charges as a basis for parole revocation unless reliable information not previously introduced is brought forth. 28 C.F.R. Sec. 2.19 (1984).

We disagree. We hold the Parole Commission properly considered the dismissed federal charge as a ground for parole revocation. "There is a significant difference between a judicial dismissal. . . and a finding of not guilty after trial." Mullen v. United States Parole Comm'n, 756 F.2d. 74, 75 (8th Cir. 1985) (Mullen). Moreover, a Commission's finding of a violation of the conditions of parole is "unaffected by the dismissal of the state charge arising out of the same conduct." Id. The Parole Commission

can consider charges that have been dismissed before trial as grounds for parole revocation. Id.; Briggs v. United States Parole Commission, 736 F.2d 446, 449 (8th Cir. 1984). Parole Commission regulations also authorize consideration of charges which have been dismissed if the Commission makes its own independent finding of "new criminal conduct." 28 C.F.R. Sec. 2.21(b) (1) (1984).

Perry next argues that the Parole Commission denied him due process by failing to provide him with adequate notice as to the charges that were to be considered in his parole revocation hearing. Specifically, Perry points to the variance between the charges listed in the warrant and those listed in the Notice of Parole revocation. In the warrant application and letter informing Perry of the revocation hearing, one of the charges listed was "theft/receiving

stolen automobile." This lack of specifics, Perry argues, renders the notice received constitutionally defective.

Due process requires that before a parolee's liberty can be terminated in a revocation hearing, the parolee is entitled to "written notice of the claimed violations of parole." Morrissey v. Brewer, 408 U.S. 471, 489 (1972). The purpose of notice is to give the party "a chance to marshal the facts of his defense and to clarify what the charges are, in fact." Wolff v. McDonnell, 418 U.S. 539, 564 (1974).

Perry's argument is not without merit. There was a variance between the theft charge listed in the warrant and the theft listed in his notice of parole revocation. However, technical and non-prejudicial variances in parole revocation proceedings do not rise to

constitutional violations. Martineau v. Perrin, 601 F.2d. 1205 (1st Cir. 1979). Here, Perry received a warrant specifically listing the charges that grew out of the May 19, arrest and was provided with further supporting documents. These supporting documents detailed the charges the Parole Commission believed constituted grounds for his parole revocation. Under these circumstances, any variance was technical and nonprejudicial.

Perry's final argument alleges that his revocation hearing was untimely. Pursuant to Parole Commission regulations, a hearing is to be held within sixty days after a probable cause determination. 18 U.S.C.A. Sec. 4214 (a) (1) (B) (West 1985). Perry's parole revocation hearing was initially scheduled for November 19, 1984, sixty-six days after the September 14, 1984,

finding of probable cause. This delay, however, was minimal and Perry has not demonstrated the loss of favorable evience or witnesses from the delay. This failure to demonstrate prejudice preludes Perry's challenge. Thus, we hold that although the revocation was untimely, no prejudice was shown.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

Eugene Perry,

Petitioner, Civil 5-86-49

v.

United States Parole Commission MEMORANDUM OPINION AND ORDER

Respondent.

Calvin C. Saunders, 860 Fulton Street, Brooklyn, NY 11238, for peitioner.

Jerome Arnold, United States Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for respondent.

Petitioner Eugene Perry, currently an inmate at the Federal Mediation Center-

in Rochester, Minnesota, filed an application for a writ of habeas corpus, alleging that respondent United States Parole Commission revoked his parole through a process that violated his constitutional right to due process and the Parole Commission's regulations. In August 7, 1986, United States Magistrate Floyd E. Boline issued a Report and recommendation that advised the court to deny petitioner's application. Petitioner then filed objections to 28 U.S.C. Sec. 636(b) (1), the court now makes a de novo determination of those portions of the Report and Recommendation to which petitioner objected.

Backround

In November 1975, the United States District Court for the District of New Jersey sentenced petitioner to 25 years immprisonment for armed bank robbery. Petitioner was paroled from this sentence

in November 1983, to be supervised until July 1, 2000. On May 18, 1984,

police in Woodbridge, New Jersey, arrested petitioner and two other individuals for possession of a stolen motor vehicle. A search revealed that the car contained masks, gloves, and two bullets and that all three persons were wearing two sets of clothes. Three days later, all three individuals were charged in a federal complaint with conspiracy to commit bank robbery. That complaint was dismissed against all three persons on May 31, 1984. A New Jersey grand jury subsequently indicted petitioner and the two others, however, for theft in the third degree for receiving a stolen automobile.

A parole violator warrant was issued against petitioner on August 6, 1984, and executed on August 15, 1984. The warrant application listed the following charges:

1. Theft--Receiving Stolen Automobile (Third Degree);

2. Association with Persons Involved in Criminal Activity; and

3. Use of Narcotics

On the basis of a preliminary interview held on September 5, 1984, respondent Parole Commission found probable cause to believe that petitioner had violated the conditions of his parole. In a letter dated September 14, 1984, responndent informed petitioner of this finding, listed the same three charges as the basis for the finding, and stated that a parole revocation hearing would be held.

Respondent Parole Commission conducted petitioner's parole revocation

hearing on January 3, 1985[1]. The hearing was held before a panel of two examiners. Although both examiners recommended that petitioner's parole be revoked, they differed with respect to their findings of fact and their recommendations for the duration of the revocation. Examiner Newman found that petitioner had committed "Theft (Possession of a Stolen Automobile)," and recommended a parole revocation of 32 months. By contrast, Examiner Alex found that petitioner had committed "Theft (Attempted Robbery)" as well as "Association with Persons Bent on the Commission of Criminal Activity," and recommended a revocation of 60 months.

On January 10, 1985, respondent issued a Notice of Action that revoked petitioner's parole for 60 months based

1. The hearing was rescheduled and delayed for various reasons discussed in Magistrate Boline's Report and Recommendation not relevant to petitioner's objections.

on the severity rating of the attempted robbery charge. Petitioner appealed this decision. Thereafter, petitioner filed his application for a writ of habeas corpus.

Discussion

Petitioner objects to the Report and recommendation on the ground that he received inadequate notice of the charges that would be considered in his parole revocation hearing, in violation of the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972). According to petitioner, the deviation between the charge of "Theft--Receiving Stolen Automobile" that appeared both in the warrant application and in the letter informing him of the revocation hearing and the charge of "Theft (Attempted Robbery)" which served as the primary basis for his parole revocation renders the notice he received constitutionally

defective. Petitioner also contends that this deviation violates the Parole Commission failed to establish the facts upon which its decision was based.

Magistrate Boline rejected these arguments, finding that "petitioner had constitutionally adequate notice of the charges against him." The Magistrate noted the variance between the charges but stressed that petitioner was provided with copies of the summary report of the preliminary probable cause interview and other documentary evidence on which the warrant and the revocation decision were based. These documents, according to the Magistrate, "make clear that the Parole Commission was considering petitioner's involvement in the alleged bank robbery conspiracy as a posssible parole violation."

Due process requires that before a parolee's liberty can be terminated in a

revocation hearing, the parolee is entitled to "written notice of the claimed violation of parole." Morrissey v. Brewer, 408 U.S. 471, 489 (1972). One of the functions of this notice is to give the party " a chance to marshall the facts in his defense and to clarify what the charges are, in fact." Wolf v. McDonnell, 418 U.S. 539, 564 (1974). The issue before the court concerns whether the warrant application and the other documents provided to petitioner constitute constituionally adequate notice of the charges to be considered at the revocation hearing.

After reviewing all of the materials provided to petitioner, the court concludes that petitioner was given constituionally adequate notice of the charges to be considered at his revocation hearing. Those materials indicate that the Parole Commission was

considering the charge of conspiracy to commit bank robbery and was aware of the facts underlying that charge. These same facts formed the basis for the Parole Commission's finding that petitioner had committed "Theft (Attempted Robbery)." Petitioner should have reasonably expected that those facts could likely establish the basis for a parole revocation. The court concludes, however, that the notice provided to petitioner, though not as clear as it should have been, was not constitually deficient. With respect to petitioner's other objections, the court finds that the Parole Commission adequately complied with its regulations and that it did establish the facts upon which its decision was based.

ORDER

Accordingly, based on the above and all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petitioner for a writ of heabeas corpus is denied.

Dated: October 27, 1987

Diana E. Murphy

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FIFTH DIVISION

Eugene Perry,

Petitioner,

Civil 5-86-49

REPORT AND

RECOMMENDATION

v.

United States Parole Commission

Respondent.

Eugene Perry, Federal Medical Center, P.O. Box 4600, Rochester, Minnesota 55903, pro se.

Jerome Arnold, United States Attorney, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota 55401, for respondent.

Petitioner, currently an inmate at the Federal Medical Center in Rochester, Minnesota, filed this application for a writ of habeas corpus, attacking the

parole commission's decision to revoke his parole. For the reasons discussed below it is recommended that petitioner's application be denied.

Backround

In November of 1975, petitioner was sentenced in the United States District Court for the District of New Jersey to 25 years to imprisonment for armed bank robbery. Petitioner was arrested for possession of a stolen motor vehicle; Three days after arrest, he was charged with conspiracy to commit bank robbery.

Filed Aug 10 1985
Francis E. Dorsal, Clerk
By S/CAB, Deputy Clerk

This arrest, and the events surrounding it, led to the revocation of petitioner's parole. After exhausting his remedies, petitioner filed this application for a writ of habeas corpus, alleging various

constitutional infirmities in the parole revocation process.

Discussion

Petitioner complains that his parole revocation hearing was untimely. 18 U.S.C. Sec. 4214(a) (1) provides that an alleged parole violator has a right to a preliminary probable cause hearing "without unnecessary delay," and, upon a finding of probable cause, a final revocation hearing within sixty days of the probable cause determination. A parole violator warrant was issued against petitioner on August 6, 1984, and executed on August 15, 1984. Petitioner was afforded a preliminary interview on September 5, 1984, to determine whether there was probable cause to believe he had violated the conditions of his parole. By letter dated September 14, 1984, the Parole Commission informed petitioner of its probable cause finding.

A revocation hearing was scheduled for November 19, 1984. Petitioner was to be represented by attorney Peter Ryan of the Public Defender's Office in Newark. Mr. Ryan was ill on the 19th; petitioner asked to go ahead with the hearing on the 20th if a public defender could be present. On the 20th, attorney Thomas Higgins from a public defender's office in Washington appeared with petitioner. Mr. Higgins advised petitioner to seek a continuance until Mr. Ryan could be present, since Mr. Ryan was familar with the case. Petitioner sought and was granted a continuance, and the matter was rescheduled for January 3, 1985.

The original hearing date of November 19, 1985, was 66 days after the finding of probable cause. The delay from November to January was at Petitioner's request, and accordingly, the court will consider only the six day

delay in determining whether petitioner is entitled to relief for the Parole Commission's failure to afford him a hearing within the sixty day limit set forth in Section 4214.

The Supreme Court has held that a parolee is entitled to certain due process protections before his parole may be revoked. Morrisey v. Brewer, 408 U.S. 471 (1972). Due process requires that a final revocation hearing be held "within a reasonable time" after the parole violator's warrant is executed. Id., 408 U.S. at 487-488. A two step inquiry is required to determine if petitioner is entitled to relief because of the Commission's delay. First, the delay must be unreasonable, and second, it must be prejudicial. Smith v. United States, 577 F.2d 1025, 1027 (11 Cir. 1978).

By enacting Section 4214, Congress has established what "reasonable" time

limits are. Since the hearing was held after the statutory sixty day time limit, the first question, whether the delay was unreasonable, must be answered in the affirmative. However, petitioner has failed to show any prejudice resulting from the six day delay. and accordingly, he is not entitled to relief on this ground. See Hannahan v. Luther, 693 F.2d 629 (7th Cir. 1982) cert. denied, 459 U.S. 1170 (1983); rehearing denied, 668 F.2d 536 (1982); Smith v. United States, supra.

Morrissey v. Brewer, supra, also requires that a parolee be given prior written notice of the alleged parole violations. The application for the violator warrant for petitioner listed the charges against him as:

> 1. THEFT -- RECEIVING STOLEN AUTOMOBILE (THIRD DEGREE)

On May 18, 1984, Subject was arrested by the Woodbridge, New Jersey Police Department and charged with the above crime. Subject was found to be driving a stolen 1979 Oldsmobile. Subject led pursuing officers on a high speed chase and subsequently fled on foot, according to USPO Naparano's report of July 20, 1984, with attachments.

2. ASSOCIATION WITH PERSONS INVOLVED IN CRIMINAL ACTIVITIY

On May 18, 1984, Subject and two codefendants were arrested in Charge #1 above. Each defendant was arrested wearing two sets of clothing and the stolen vehicle contained four masks, numerous pairs of gloves, and two pillowcases. Codefendant George Hawkins admitted that they were going to rob a bank, according to USPO Napurano's report of July 20, 1984, with attachments.

3.USE OF NARCOTICS

On May 18, 1984, Subject admitted to the FBI that he had been freebasing
cocaine and had consumed 32 ounces over a 5-day period, according to USPO Napurno's report of July 20, 1984, with attachments.

The Parole Commission found probable cause as to these same charges.

The final Notice of Action described the charges which petitioner was found to have violated as:

CHARGE #1--THEFT (ATTEMPTED ROBBERY)

CHARGE #2--ASSOCIATION WITH PERSONS BENT ON THE COMMISSION OF CRIMINAL ACTIVITY.

Petitioner argues that the variance in these descriptions of the charges deprived him of his due process right to adequate notice of the charges against him. Petitioner requests that he be given a new parole revocation hearing on the charges as listed in the violator warrant.

The record indicates that petitioner was given copies of the summary report of the preliminary probable cause interview and the dcumentary evidence on which the warrant application and the subsequent

revocation decision were based. See Letters dated September 14, 1984, from Parole Commission to petitioner, with attachments (Exhibits to Government's Response). These letters and attachments make clear that the Parole Commission was considering Petitioner's involvment in the alleged bank robbery conspiracy as a possible parole violation. Petitioner had notice of the actual allegation against him, and offered a defense to all the allegations. The record clearly shows that, despite the variance between the charges listed in the violator's warrant and the violations found by the Parole Commission, petitioner had constitutionally adequate notice of the charges against him.

Petitioner alleges that the Parole Commission violated 18 U.S.C. 4213(b) and the Commission's regulations by issuing a parole violator warrant and conducting

parole revocation proceedings before the state charges against petitioner had been disposed of. Nothing in the statute or regualtions supports petitioner's allega-tion. The language of Section 4213(b) is permissive:

> ...in the case of any parolee charged with a criminal offense issuance of a summons or warrant may be suspended pending disposition of the charge, [emphasis added]

28 C.F.R. Section 2.44(b) and the Parole Commission's Rules and Procedures Manual use this same permissive language. The decision to suspend revocation is clearly committed to the discretion of the Parole Commission, and petitioner's challenge on this ground must fall.

Petitioner further argues that because his parole revocation proceedings were held before the state criminal

trial. he was effectively denied his right to confront and cross-examine the witnesses against him. This claim must also fall.

Petioner had initially requested that the arresting officer and fellow arrestee George Hawkins be subpoenaed to appear at his revocation hearing. Subpoenas were issued for the November 19, 1984, hearing, and were prepared for the January 3, 1985, hearing. At the request of petitioner's counsel, those subpoenas were not served for the January hearing. Petitioner's counsel appearently decided that cross-examination at the parole revocation hearing would reveal his defense strategy on the pending state charges, so he contacted the parole authorities to request that these witnesses not be called. Petitioner cannot now complain that he was denied his right to cross

examine those witnesses when their absence from the hearing was at the request of his counsel.

Petitioner was afforded a full opportunity to confront the witnesses against him; a tactical decision by his counsel to forego the opportunity does not amount to a constitutional violation. See, e.g., United States v. Brugger, 549 F.2d. 2, 4 (7th Cir.) cert. denied, 431 U.S. 919 (1977) (No constitutional violation where defendant forced to choose whether to testify at his parole revocation hearing. and thereby risk self-incrimination with respect to subsequent state criminal trial).

Finnally, petitioner attacks the substance of the Parole Commission's decision itself. The Commission's finding of a parole violation must be supported by a proponderance of the evidence." 18 U.S.C. Section 4214(d).

Judicial review of decision of the Commission is limited to whether it was "arbitrary, caprecious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. Section 706(2)(A)." Briggs v. United States, 736446, 448 (8th Cir. 1984).

Petitioner argues that the evidence was insufficient because the Commission relied upon documentary evidence instead of live testimony in making its decision. The record shows the Commission considered the police reports, the reports of petitioner's parole officer, and petitioner's testimony in determining whether petitioner had violated the conditions of his parole. As noted by the Eighth Circuit,

> the Supreme Court has emphasized [parole revocation] proceedings are part of the criminal prosecution and may be conducted under somewhat less rigid evidentiary rules. the Court said in Morrissey:

> [T]he process should be flexible enough to consider evidence including letters, affidavits, andother material that would not be admissible in an adversary criminal trial. [citation ommitted]

United States v. Pattman, 535 F.2d 1062, 1063 (8th Cir. 1976).

The police reports were properly admitted in petitioner's hearing. The Commission had already demonstrated its readiness to subpoena witnesses for petitioner. Petitioner's counsel requested that witnesses not be called at the January 3, 1985, hearing. Petitioner and his counsel must have been aware that by honoring their request not to call these witnesses, the evidence before the Commission would in large part, be limited to documentary evidence. To the extent introduction of the documentary evidence denied petitioner the opportunity to confront and cross-examine

the authors of those documents, petitioner waived those rights.

Petitioner admitted the basic facts surrounding his arrest on May 18, 1984; he offered an alternative explaination of those facts. It was within the Parole Commission's discretion to assess petitioner's credibility and interpret the facts differently than petitioner. The Commission's Notice of Action indicates that it relied on the factual information in the police reports as well as the probation officer's summary in reachingits decision. Petitioner was thus advised of the factual basis of the Commission's revocation decision. The Commission's decision was supported by a preponderance of the evidence and the undersigned cannot conclude that it was arbitrary, caprecious or an abuse of discretion.

Accordingly, it is recommended that petitioner's application for a writ of habeas corpus be denied.

Floyd E. Boline

United States Magistrate

Dated: August 7, 1986